Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-

DELAWARE COUNTY PRISON BOARD OF INSPECTORS,
Petitioner

vs.

JALEE HYNSON, a minor, by and through her Grandparent and Guardian, JEFFRIE HYNSON, and CHARZEL HYNSON, a Minor, by and through his Grandparent and Guardian, JEFFRIE HYNSON, and JEFFIRE HYNSON, Administratrix of the Estate of ALESIA HYNSON, and JEFFRIE HYNSON, in her own right,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

Is a municipal entity, sued for damages as a person itself under *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978), precluded by *Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980), from raising in its own separate, non-derivative defense the objective qualified immunity formulated in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982), and thus subject to full litigation of the claim that its policy violated civil rights, even when that policy is found not to have violated clearly established rights and the entity's executive official is found to be entitled to prevail on the same objective qualified immunity defense for the formulation, implementation and execution of that policy?

LIST OF PARTIES

In addition to the parties named in the caption, Warden Kenneth Matty was a party, co-appellant with petitioner Prison Board, in the Court of Appeals. The Court of Appeals held that Matty "is entitled to prevail on his qualified immunity claim" and reversed "the order of the district court denying Warden Matty's motion for summary judgment", *Hynson v. City of Chester,* 827 F.2d 932, 935 (3 Cir. 1987); Appendix, p. A-7, *infra,* and Warden Matty is, therefore, not included as a party here. In addition to petitoner Prison Board, respondents sued several other defendants listed in the caption of the Court of Appeals opinion, Appendix, p. A-1, *infra,* but none of those other defendants participated in the proceedings in the Court of Appeals and, therefore, are not included as parties here.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	i
OPINIONS BELOW	1
STATEMENT OF SUPREME COURT JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT: Reasons for Allowance of Writ	4
CONCLUSION	10
APPENDIX:	
Opinion of the Court of Appeals	A- 1
Judgment of the Court of Appeals	A- 8
Order Denying Petition for Rehearing	A-10
Order of the District Court	A-11

TABLE OF AUTHORITIES

	Page
CASES	
Anderson v. Creighton, ____U.S.____, 107 S.Ct. 3034, 97 L.Ed. 2d 523 (1987)	5,7
Bratton v. City of Detroit, 704 F.2d 878 (6 Cir. 1983).	8
Butz v. Economou, 438 U.S. 478, 98 S.Ct. 1894, 57 L.Ed. 2d 895 (1978)	4,6,7,8
City of Los Angeles v. Heller, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed. 2d 806 (1986)	4,7
Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 96 L.Ed. 2d 185 (1980)	5
Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982)	i,3,4,5, 6,7
Hynson v. City of Chester, 827 F.2d 932 (3 Cir. 1987)	i,1,3,4, 6,7
Mazanec v. North Judson-San Pierre School Corp., 798 F.2d 230 (7 Cir. 1986)	8
Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed. 2d 411 (1985)	2,4,5,6
Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978)	i,7
Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961)	7
Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980)	i,4,5
Robinson v. Via, 821 F.2d 913 (1 Cir. 1987)	7
CONSTITUTION AND STATUTES	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	2
28 U.S.C. § 1343	2
42 U.S.C. § 1983	1,3

OPINIONS BELOW

The opinion of the Court of Appeals, reproduced in full in Appendix, p. A-1 to A-7, *infra,* has been published as *Hynson v. City of Chester,* 827 F.2d 932 (3 Cir. 1987). The district court issued no opinion, and its unpublished order denying petitioner's motion for summary judgment is reproduced in full at Appendix, p. A-12, *infra.*

STATEMENT OF SUPREME COURT JURISDICTION

The judgment of the Court of Appeals, reproduced in full in Appendix, p. A-8 and A-9, *infra,* and its opinion were filed on September 2, 1987. Petitioner's timely petition for rehearing was denied by the order of the Court of Appeals, reproduced in full in Appendix, p. A-10 and A-11, *infra,* which was filed on October 1, 1987. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents' federal damages claim against petitioner was predicated upon 42 U.S.C. § 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

The district court had original subject matter jurisdiction over respondents' civil rights damages claims against petitioner and its warden under 28 U.S.C. § 1343. The Court of Appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review the district court's denial of petitioner's motion for summary judgment on the ground of qualified immunity, *Mitchell v. Forsyth,* 472 U.S. 511, 524-530, 105 S.Ct. 2806, 2815-2817, 86 L.Ed. 2d 411, 424-427 (1985).

The pertinent facts material to respondents' claim against petitioner and petitioner's motion for summary judgment are not disputed.

On October 5, 1984, Jamil Gandy was sentenced by a state court judge to a term of four to twenty-three months after pleading guilty to a charge of theft by receiving stolen property. Gandy was to serve two days a week in petitioner's prison, and to be furloughed for the remaining five days each week. Gandy's sentence was scheduled to start on Sunday, October 14, 1984 at 5:00 p.m., when he was due to report to the prison.

In the meantime, allegedly on October 11, 1984, Alesia Hynson, Gandy's ex-girlfriend, obtained a restraining order against Gandy from a different judge of the state court.[1] Respondent and its officers were not involved in or notified of the restraint order and proceedings. The restraining order, predicated upon Gandy's prior harrassment and abuse of Hynson and her children, precluded Gandy from coming into contact with Hynson or her children.

When Gandy failed to report to the prison as scheduled on October 14, 1984, the prison officials on duty prepared an incident report that night, pursuant to the prison's "no show" policy at issue in this litigation. Pursuant to this policy, and

[1] Discovery taken by the other parties to respondents' lawsuit during the pendency of petitioner's appeal revealed that the restraining order in fact had not been presented to and signed by the judge until October 16, 1984, contrary to the allegation made in respondents' amended complaint and assumed *en arguendo* in petitioner's motion for summary judgment that the restraining order had been issued on October 11, 1984.

because of the date and hour of the incident, the sentencing judge was to be informed of Gandy's failure to report when the court reopened on the following morning, and requested to issue a bench warrant for Gandy's arrest. As conceded by respondent, no authority existed investing petitioner and its officers with the duty or power to apprehend Gandy.

In the meantime, some seven hours after he had been due to report to the prison, Gandy went to Hynson's place of employment and shot her. Her supervisor found her dead an hour later.

Respondents initiated this suit against petitioner and its warden on May 15, 1986. In their amended complaint respondent sought damages under 42 U.S.C. § 1983, asserting that the prison's "no show" policy violated Hynson's due process and equal protection rights because the policy "failed to provide a mechanism for the immediate apprehension of prisoners who failed to report for weekend sentences", and "in effect excuses the inmate from jail and, in this case, 'all but insured' that Hynson, a member of a particular group of persons whom Gandy had previously victimized, would not be protected", *Hynson, supra,* 827 F.2d at 934-935; Appendix, p. A-6, *infra.*

On October 21, 1986, petitioner and defendant warden filed a motion for summary judgment in which they each reasserted their separate but identical *Harlow* objective qualified immunity defenses to this litigation as raised in their answer to respondents' amended complaint. Respondents filed their answer to the motion for summary judgment on October 30, 1986. On October 31, 1986, the district court filed an order denying the motion for summary judgment without explanation.

Petitioner and the warden then timely appealed the denial of their motion for summary judgment. During the course of their oral argument before the Court of Appeals panel on June 16, 1987, respondents asserted for the first time that the qualified immunity defense was not available to petitioner. After affording the parties an opportunity to file supplemental briefs on this issue, the Court of Appeals panel rendered its decision on September 2, 1987.

Rejecting petitioner's arguments, the Court of Appeals held that the decision rendered by this Honorable Court in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1393, 62 L.Ed. 2d 673 (1980), precluded petitioner, as a municipal corporation, from asserting as a defense the objective qualified immunity formulated by this Honorable Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982), *Hynson, supra*, 827 F.2d at 934; Appendix, p. A-5, *infra*. The Court held, however, that petitioner's warden was entitled to prevail on the identical but separately asserted defense, because the policy did not violate any clearly established rights of Hynson, *Hynson, supra*, 827 F.2d at 935; Appendix, A-6, *infra*. The Court of Appeals affirmed the district court's order with respect to petitioner, but reversed that order with respect to petitioner's warden. The Court of Appeals also subsequently denied petitioner's timely petition for rehearing.

For the reasons that follow, petitioner respectfully asks that this Honorable Court grant this petition for writ of certiorari and reverse the judgment and orders of the lower courts adverse to petitioner.

ARGUMENT: Reasons for Allowing the Writ

A petition for writ of certiorari, to review the decision that petitioner cannot assert the same objective qualified immunity defense afforded to its warden, and thus cannot achieve the summary judgment on respondents' § 1983 claim granted to the warden because the policy did not violate any clearly established rights of Hynson, should be granted in this case "[b]ecause of the importance of the immunity doctrine to both the vindication of constitutional guarantees and the effective functioning of government", *Butz v. Economou*, 438 U.S. 478, 480-481, 98 S.Ct. 2894, 2897, 57 L.Ed. 2d 895 (1978), and because this decision unduly extends the holding of this Honorable Court in *Owen, supra*, frustrates the admonitions and policy objectives reiterated in *Harlow, supra*, and furthered in *Mitchell, supra*, runs counter to the precepts most recently reaffirmed by this Honorable Court in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed. 2d 806 (1986),

and in *Anderson v. Creighton*, ____U.S.____, 107 S.Ct. 3034, 97 L.Ed. 2d 523 (1987), and makes little acceptable practical or jurisprudential sense.

In *Owen, supra,* the municipality attempted to defend against the liability consequent upon the execution of its unconstitutional policy by asserting the subjective good faith of its officers who implemented that policy. Rejecting that vicarious or derivative subjective good faith defense, this Honorable Court explicitly held that "the municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983", 445 U.S. at 638, 100 S.Ct. at 1409 (footnote omitted). The truly limited scope of this holding was reconfirmed seven months later when the Court unanimously observed that "in *Owen v. City of Independence, supra,* a municipality's claim that it could assert the immunity of its officers and agents in a § 1983 damages action was rejected since there was no basis for such a right at common law", *Dennis v. Sparks,* 449 U.S. 24, 29, 101 S.Ct. 183, 187, 96 L.Ed. 2d 185 (1980).

The decision of the Court of Appeals in this case, however, extends the holding of *Owen* beyond the derivative subjective good faith defense, an issue not raised by petitioner here, to subsume and extinguish the distinct defense actually asserted by petitioner: a municipal person's own right to quick termination of insubstantial lawsuits by asserting objective immunity early in the litigation to dismiss the § 1983 claim because its policy did not violate clearly established constitutional rights. The decision of the Court of Appeals unduly extends the narrow holding of *Owen* and inters a sound, practical defense that this Honorable Court had not formulated until two years after *Owen* when it decided *Harlow, supra,* in 1982.

In *Harlow, supra,* this Honorable Court agreed that "public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial", 457 U.S. at 813, 102 S.Ct. at 2736. In *Mitchell, supra,* the Court furthered that objective by holding that orders denying summary judgment on *Harlow's,* objective immunity are immediately reviewable in advance of

further litigation and trial, 472 U.S. at 524-530, 105 S.Ct. at 2815-2817. In both cases, the Court recognized that attendant to claims, such as that advanced in this case by respondents, are "social costs" which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office", *Harlow, supra,* 457 U.S. at 814, 102 S.Ct. at 2736, and that insubstantial lawsuits "undermine the effectiveness of government as contemplated by our constitutional structure", *Harlow, supra,* 457 U.S. n.35 at 819, 102 S.Ct. n.35 at 2739, and are "peculiarly disruptive of effective government", *Mitchell, supra,* 472 U.S. at 526, 105 S.Ct. at 2815. In *Harlow, supra,* the Court also recognized that "the dismissal of insubstantial lawsuits without trial" was "a factor presupposed in the balance of competing interests struck by our prior cases", 457 U.S. at 814, 102 S.Ct. at 2736, and that reliance upon its objective qualified immunity formula "should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment", 457 U.S. at 818, 102 S.Ct. at 2738. The Court reiterated its admonition that insubstantial suits should not be allowed to proceed to trial, *Harlow, supra,* 457 U.S. n.35 at 819, 102 S.Ct. n.35 at 2739, earlier expressed in *Butz, supra,* 438 U.S. at 507-508, 98 S.Ct. at 2911.

The decision of the Court of Appeals adverse to petitioner in this case frustrates the admonitions and policy objectives reiterated by this Honorable Court. Although petitioner's warden, who formulated and implemented the policy at issue in this case, may no longer be a party to respondents' § 1983 claim, petitioner obviously remains a party and its warden unquestionably remains involved in this litigation. The Court of Appeals correctly held, as to petitioner's warden, particularly in light of respondents' concession that no authority could be found to impose the duty to apprehend that lies at the heart of their claims against petitioner and its warden, that the "no show" policy did not violate any clearly established rights of Hynson, *Hynson, supra,* 827 F.2d at 935. Although respondents' claim against petitioner is identical to that now dismissed against its warden, that patently insubstantial claim cannot be eliminated without further litigation, trial and perhaps another

appeal. The social costs and disruptions of effective government which this Honorable Court has expressly sought to avoid must now be borne as consequences of the Court of Appeals' decision. "In order to implement the protection from suit, the standard governing the availability of this defense has evolved into one of objective reasonableness, designed to 'permit the resolution of many insubstantial claims on summary judgment' ", *Robinson v. Via,* 821 F.2d 913, 920 (1 Cir. 1987). The decision of the Court of Appeals adverse to petitioner undeniably upsets this design.

That decision also runs counter to the principles most recently reaffirmed by this Honorable Court in *City of Los Angeles v. Heller,* and in *Anderson, supra.* The Court of Appeals rejected petitioner's arguments that *Owen* had not precluded the objective qualified immunity later formulated in *Harlow,* because, in its view, "Both the history and policy relied on in *Owen* to establish that municipalities may not assert the defense of qualified immunity applied to both the subjective and objective elements of that defense", *Hynson, supra,* 827 F.2d at 934. A re-examination of that history and policy, like the re-examination that was done in *Monell, supra,* to overrule *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961), such as that delineated by Justice Powell's dissenting opinion in *Owen,* should demonstrate that the objective qualified immunity defined in *Harlow,* can be recognized. Historical revision may, however, be unnecessary. As noted in *Butz, supra,* "Section 1 of the Civil Rights Act of 1871—the predecessor of § 1983—said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law. This Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from § 1983 liability in a variety of contexts", 438 U.S. at 502-503, 98 S.Ct. 2908-2909.

The historical anchor used by the Court of Appeals to scuttle petitioner's defense ignores this flexibility and realism, and contravenes the precepts lately expressed by this Honorable Court in *Anderson, supra,* 107 S.Ct. at 3041-3042:

"Although it is true that we have observed that our determinations as to the scope of official immunity are made in the light of the 'common-law tradition,' *Malley,* 475 U.S., at 342, 106 S.Ct., at 1097, we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow,* where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required a common law with an objective inquiry into the legal reasonableness of the official action. *See Harlow,* 457 U.S., at 815-820, 102 S.Ct., at 2736-2739. As we noted before, *Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board'." (footnote omitted). The Court of Appeals' decision, exposing petitioner to further litigation and an award of damages even though its officer inflicted no constitutional harm, also contravenes the principle recently reaffirmed by this Honorable Court in *City of Los Angeles v. Heller, supra,* that neither *Monell,* nor "any other of our cases" authorizes an award of damages against a municipal corporation based on the actions of one of its officers when it has been concluded that the officer inflicted no constitutional harm, ____U.S.____, 106 S.Ct. at 1573. *Accord, Mazanec v. North Judson-San Pierre School Corp.,* 798 F.2d 230, 235 (7 Cir. 1986); *Bratton v. City of Detroit,* 704 F.2d 878, 898 (6 Cir. 1983).

Finally, the dichotomy struck by the Court of Appeals, between petitioner and its warden on the policy common to both defendants, and between the prompt and protracted disposition of identical insubstantial claims that the policy violated civil rights despite the absence of a duty to act as conceded by respondents, makes little practical or jurisprudential sense. Prompt dismissal of insubstantial claims cannot be achieved when the lower courts refuse to allow targeted governmental defendants to raise the *Harlow* objective immunity challenge to the those claims. This dichotomy, in practical effect, provides only nominal dismissal of the officials. Because the entities that they are committed to serve remain parties to

and must defend these insubstantial claims, those officials must still remain involved in the extended litigation. The dichotomy also unquestionably does nothing to eliminate or minimize the social costs and disruptions to effective government that this Honorable Court has sought to avoid.

In this important aspect of § 1983 jurisprudence, only the exercise of supreme judicial and supervisory powers by this Honorable Court can deflect the confusion and disruptions created by the principle espoused by the lower court in this case.

CONCLUSION

For these reasons, petitioner respectfully requests that this Honorable Court issue a writ of certiorari to review and to reverse the judgment of the Court of Appeals denying to petitioner the qualified immunity which it asserted against respondents' insubstantial § 1983 claim.

Respectully submitted,

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DATE: November 2, 1987

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-1687

HYNSON, JALEE, a minor, by and through her grandparent and guardian, HYNSON, JEFFRIE and HYNSON, CHARZELL, a minor, by and through his grandparent and guardian, HYNSON, JEFFRIE, and HYNSON, JEFFRIE, Administratrix of the estate of HYNSON, ALESIA, deceased, on behalf of the estate of HYNSON, ALESIA and HYNSON, JEFFRIE, in her own right,

Appellees,

v.

THE CITY OF CHESTER and LASTOWKA, CAPTAIN A. JOSEPH, JR., CHESS, SERGEANT ALBERT F. EDLER, OFFICER DANIEL, WILLIS, MALLIE CORPORAL and JOHN DOE, officers/members of THE CHESTER POLICE DEPARTMENT and THE BOROUGH OF EDDYSTONE and THE EDDYSTONE POLICE DEPARTMENT and DELAWARE COUNTY PRISON and MATTY, KENNETH, as prison warden of Delaware County Pennsylvania and SCOTT FOAM, INC., a subsidiary of GENERAL FELT INDUSTRIES, INC. and SCOTT PAPER COMPANY and ALLIED SECURITY, INC. and BROCK INTERNATIONAL SECURITY CORP. and THE SOUTH MEDIA CITIZEN'S CLUB and DELAWARE COUNTY DOMESTIC ABUSE PROJECT, INC. and WIDEMAN, DOLLY, L.

Delaware County Prison
Board of Inspectors
and Kenneth Matty
Appellants

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 86-2913)

Argued June 16, 1987

Before SEITZ, MANSMANN, *Circuit Judges,*
and DEBEVOISE, *District Judge.**

(Filed: September 2, 1987)

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* The Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Appellants Delaware County Prison Board of Inspectors and Warden Kenneth Matty appeal from the order of the district court denying their motion for summary judgement in a § 1983 suit. Because Appellants assert the defense of qualified immunity, the order denying their motion is an appealable "final decison." *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). We therefore have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

I.

Jamil Gandy was sentenced in the Delaware County Court of Common Pleas to a term of four to twenty-three months after pleading guilty to a charge of theft by receiving stolen property. Gandy was to serve two days a week in prison, and be furloughed for the remaining five days each week. His sentence was scheduled to start on Sunday, October 14, 1984 at 5:00 p.m., when he was due to report to the prison.

On October 11, 1984, Alesia Hynson, Gandy's ex-girlfriend, obtained a restraining order against Gandy from a different Delaware County judge from the sentencing judge, precluding Gandy from coming into contact with her or her two minor children. This protection from abuse order was based on Gandy's prior harrassment and abuse of Hynson and her children.

Gandy failed to report to prison on October 14. The prison officials, pursuant to their oral "no show" policy, completed an incident report. Since Gandy was serving a weekend sentence, the report was to be delivered to the sentencing judge on the following morning, when the courts reopened. The judge would then be requested to issue a bench warrant for Gandy's arrest. Approximately seven hours after Gandy failed to report to the prison, he went to Hynson's place of employment and shot her. Her supervisor found her dead an hour later.

Hynson's mother initiated the suit on May 15, 1986, against various municipalities and their subdivisions, and public officials, seeking damages on behalf of Hynson's children and her estate. Plaintiff asserted that these groups, acting under color or state law, deprived decedent of rights, privileges and immunities secured to her by the constitution, in violation of 42 U.S.C. § 1983 (1982). As to defendants Delaware County Prison Board of Inspectors and Kenneth Matty, Hynson alleged in her amended complaint that Matty and the Prison Board condoned a pattern or practice of failing to take steps to insure that prisoners who fail to appear are apprehended, and that this failure resulted in the deprivation of Hynson's equal protection and due process rights.

Matty and the Prison Board of Inspectors filed a motion for summary judgment, claiming, *inter alia,* that they were protected by qualified immunity. The district court denied this motion without an opinion on October 31, 1986. This appeal followed.

II.

On appeal, the Prison Board and Warden Matty contend that the district court erred in denying their motion for summary judgment because they are protected against civil liability by the doctrine of qualified immunity. Along with this entitlement, they contend that they enjoy a right not to go to trial, or face other burdens of litigation. *See Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Mitchell, supra.* Our review of this legal question is plenary. *See Gans v. Mundy,* 762 F.2d 338 (3rd Cir.), *cert. denied,* ____U.S.____, 106 S.Ct. 537 (1985). We will first address whether the Prison Board is entitled to assert this affirmative defense.

A.

The Delaware County Prison Board of Inspectors is, by its own admission, a municipal corporation. The Supreme Court has squarely addressed the issue of whether qualified immunity

under section 1983 extends to municipalties and has clearly held that it does not. *See Owen v. City of Independence,* 445 U.S. 622 (1980): "municipalities have no immunity from damages liability flowing from their constitutional violations . . . ." *Id.* at 657.

The Prison Board urges that when the Supreme Court eliminated the subjective element of the qualified immunity defense for individuals, *see Harlow, supra,* it then meant for objective qualified immunity to extend to municipalities. We find this argument to be without merit. Both the history and policy relied on in *Owen* to establish that municipalities may not assert the defense of qualified immunity apply to both the subjective and objective elements of that defense. In no way has *Harlow* modifed the central holding in *Owen.* In fact, when defining the new objective standard for qualified immunity. *Harlow* specifcally holds that it applies to "*government officials* performing discretionary functions." 457 U.S. at 818 (emphasis added). Although the Prison Board attempts to argue otherwise, *Owen's* holding that municipalities are not entitled to the defense of qualified immunity is still good law.

Since the Prison Board is a municipal corporation, it is not entitled to assert the qualified immunity defense. We will therefore affirm the District Court's order denying summary judgment to the Prison Board.

B.

We now turn to Warden Matty's claim of qualified immunity. Prison officials are entitled to qualified immunity from monetary liability if they are acting reasonably in the good faith fulfillment of their responsibilities. *Wilson v. Schillinger,* 761 F.2d 921, 929 (3rd Cir. 1985), *cert. denied,* ____ U.S. ____, 106 S.Ct. 1494 (1986). The test for government officials to establish the good faith necessary for qualified immunity was recently set out by the Supreme Court. Government officals performing discretionary functions will be immune from liability for civil damages if their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known. *Id.* at 930, *citing Harlow,* 457 U.S. at 818.

In reviewing the denial of defendant's claim of qualified immunity, our determination is limited to the purely legal question of whether the facts alleged support a violation of clearly established law:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

MITCHELL, 472 U.S. at 528.

In the case before us, plaitniff's claim is that the Warden violated Alesia Hynson's due process and equal protection rights by formulating a "no show" policy that failed to provide a mechanism for the immediate apprehension of prisoners who fail to report for weekend sentences. She further claims that the existing policy in effect excuses the inmate from jail and, in this case, "all but insured" that Hynson, a member of a particular group of persons whom Gandy had previously victimized, would not be protected.

While the events in this case are certainly unfortunate, we fail to see how Warden Matty's conduct violated any "clearly established" rights of Hynson. Plaintiff concedes that she can cite no authority that imposes a duty to apprehend on the warden. Even assuming the existence of some such affirmative duty, we believe that, as applied to the facts of this case, it can in no way be said to have been clearly established at the time of the alleged violation. *Cf. Chinchello v. Fenton*, 805 F.2d 126 (3rd Cir. 1986) (defendant owed plaintiff no clearly established duty to take affirmative steps to see that his constitutional

rights were not violated by others). Plaintiff has failed to make a showing on this record that the warden had reason to know that his conduct was violating a clearly established right. *See Wilson*, 761 F.2d at 930.

Although the officials claiming qualified immunity have the burden of pleading and proof, *Kovats v. Rutgers*, Nos. 86-5413, 86-5506 (3rd Cir. 1987); *Losch v. Borough of Parkesburg, PA.*, 736 F.2d 903 (3rd Cir. 1984), a plaintiff who seeks damages for violation of constitutional rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue. *Davis v. Scherer*, 468 U.S. 183, 197 (1984). Since the plaintiff has failed to do this, the defendant is entitled to prevail on his qualified immuntiy claim.

III.

Accordingly, we will affirm the order of the district court with respect to the Prison Board, and reverse the order of the district court denying Warden Matty's motion for summary judgment.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

In reviewing the denial of defendant's claim of qualified immunity, our determination is limited to the purely legal question of whether the facts alleged support a violation of clearly established law:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

MITCHELL, 472 U.S. at 528.

In the case before us, plaitniff's claim is that the Warden violated Alesia Hynson's due process and equal protection rights by formulating a "no show" policy that failed to provide a mechanism for the immediate apprehension of prisoners who fail to report for weekend sentences. She further claims that the existing policy in effect excuses the inmate from jail and, in this case, "all but insured" that Hynson, a member of a particular group of persons whom Gandy had previously victimized, would not be protected.

While the events in this case are certainly unfortunate, we fail to see how Warden Matty's conduct violated any "clearly established" rights of Hynson. Plaintiff concedes that she can cite no authority that imposes a duty to apprehend on the warden. Even assuming the existence of some such affirmative duty, we believe that, as applied to the facts of this case, it can in no way be said to have been clearly established at the time of the alleged violation. *Cf. Chinchello v. Fenton,* 805 F.2d 126 (3rd Cir. 1986) (defendant owed plaintiff no clearly established duty to take affirmative steps to see that his constitutional

rights were not violated by others). Plaintiff has failed to make a showing on this record that the warden had reason to know that his conduct was violating a clearly established right. *See Wilson,* 761 F.2d at 930.

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A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-1687

HYNSON, JALEE, a Minor, by and through her Grandparent and Guardian, HYNSON, JEFFRIE and HYNSON, CHARZELL, a Minor, by and through his Grandparent and Guardian, HYNSON, JEFFRIE, and HYNSON, JEFFRIE, Administratrix of the Estate of HYNSON, ALESIA, Deceased, on behalf of the Estate of HYNSON, ALESIA and HYNSON, JEFFRIE, in her own right,

Appellees,

v.

THE CITY OF CHESTER and LASTOWKA, CAPTAIN A. JOSEPH, JR., CHESS, SERGEANT ALBERT F. EDLER, OFFICER DANIEL, WILLIS, MALLIE CORPORAL and JOHN DOE, OFFICERS/MEMBERS OF THE CHESTER POLICE DEPARTMENT and THE BOROUGH OF EDDYSTONE and THE EDDYSTONE POLICE DEPARTMENT and DELAWARE COUNTY PRISON and MATTY, KENNETH, as prison warden of Delaware County Pennsylvania and SCOTT FOAM, INC., a subsidiary of GENERAL FELT INDUSTRIES, INC. and SCOTT PAPER COMPANY and ALLIED SECURITY, INC. and BROCK INTERNATIONAL SECURITY CORP. and THE SOUTH MEDIA CITIZEN'S CLUB and DELAWARE COUNTY DOMESTIC ABUSE PROJECT, INC. and WIDEMAN, DOLLY, L.

Delaware County Prison
Board of Inspectors
and Kenneth Matty,
Appellants

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 86-2913)

Present: SEITZ and MANSMANN, *Circuit Judges*, and DEBEVOISE, *District Judge**

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 16, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court entered October 31, 1986, be and the same is hereby affirmed insofar as the Prison Board and reversed insofar as the said order denied Warden Matty's motion for summary judgment.

ATTEST:

CLERK

September 2, 1987

* The Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

NO. 86-1687

HYNSON, JALEE, a Minor by and through her Grandparent and Guardian, HYNSON, JEFFRIE and HYNSON, CHARZELL, a Minor, by and through his Grandparent and Guardian, HYNSON, JEFFRIE, and HYNSON, JEFFRIE, Administratrix of the Estate of HYNSON, ALESIA, Deceased, on behalf of the Estate of HYNSON, ALESIA and HYNSON, JEFFRIE, in her own right,

Appellees,

v.

THE CITY OF CHESTER and LASTOWKA, CAPTAIN A. JOSEPH, JR., CHESS, SERGEANT ALBERT F. EDLER, OFFICER DANIEL, WILLIS, MALLIE CORPORAL and JOHN DOE, OFFICERS/MEMBERS OF THE CHESTER POLICE DEPARTMENT and THE BOROUGH OF EDDYSTONE AND THE EDDYSTONE POLICE DEPARTMENT and DELAWARE COUNTY PRISON and MATTY, KENNETH, as Prison Warden of Delaware County Pennsylvania and SCOTT FOAM, INC., a Subsidiary of GENERAL FELT INDUSTRIES, INC. and SCOTT PAPER COMPANY and ALLIED SECURITY, INC. and BROCK INTERNATIONAL SECURITY CORP. and THE SOUTH MEDIA CITIZEN'S CLUB and DELAWARE COUNTY DOMESTIC ABUSE PROJECT, INC. and WIDEMAN, DOLLY, L.,

Delaware County Prison
Board of Inspectors
and Kenneth Matty,
Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-2913)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, *Circuit Judges* and DEBEVOISE, *District Judge.**

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ

Circuit Judge

DATED: October 1, 1987

* The Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 86-2913

JALEE HYNSON, a minor by and through her grandparents and guardian, JEFFRIE HYNSON, *et al*

VS.

THE CITY OF CHESTER, *et al*

ORDER

AND NOW, this 31st day of October, 1986, upon consideration of the Motion for Summary Judgment of Defendants, Delaware County Prison Board of Inspectors and Kenneth Matty, and any and all replies thereto, it is hereby ORDERED and DECREED that said Motion for Summary Judgment is dismissed.

BY THE COURT:

/S/ KATZ

No. 87-726

Supreme Court, U.S.
FILED
DEC 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

DELAWARE COUNTY PRISON BOARD OF INSPECTORS,

Petitioner,

vs.

JALEE HYNSON, a minor, by and through her Grandparent and Guardian, JEFFRIE HYNSON, and CHARZEL HYNSON, a Minor, by and through his Grandparent and Guardian, JEFFRIE HYNSON, and JEFFRIE HYNSON, Administratrix of the Estate of ALESIA HYNSON, and JEFFRIE HYNSON, in her own right.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Has the case of *Owen v. City of Independence,* 445 U. S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), which clearly holds that a municipality enjoys no immunity whatsoever in Section 1983 actions, been tacitly or impliedly overruled by subsequent United States Supreme Court cases dealing with the qualified immunity of public officials?

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TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
Summary of Argument	3
Reasons for Denying the Writ	3
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Anderson v. Creighton, ____ U.S. ____, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 4, 7

Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 96 L. Ed. 2d 185 ..... 4, 6, 7

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 4, 6, 7, 8

Hynson v. City of Chester, 827 F.2d 932 (3 Cir. 1987) 2

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Contents

Page

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) 4

Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) 5

Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980) .....i, 3, 4, 5, 6, 8

Statute Cited:

42 U.S.C. § 1983.....i, 4, 5,

Rule Cited:

United States Supreme Court Rule 17.1(a)(b)(c) 3

No. 87-726

In The

Supreme Court of the United States

October Term, 1987

DELAWARE COUNTY PRISON BOARD OF INSPECTORS,

Petitioner,

vs.

JALEE HYNSON, a minor, by and through her Grandparent and Guardian, JEFFRIE HYNSON, and CHARZEL HYNSON, a Minor, by and through his Grandparent and Guardian, JEFFRIE HYNSON, and JEFFRIE HYNSON, Administratrix of the Estate of ALESIA HYNSON, and JEFFRIE HYNSON, in her own right.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT OF THE CASE

Respondents call attention to certain inaccuracies in the

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petitioner's Statement of the Case which require correction or clarification as follows:

(a) In footnote 1 on page 2 of the Petition, petitioners state that, "the restraining order in fact had not been presented to and signed by the Judge until October 16, 1984". On October 11, 1984, Alesia Hynson appeared in court for the final hearing on a Protection from Abuse Petition against Gandy. The judge verbally granted the relief sought on the record. The actual typed order was not presented to the judge for signature by Alesia Hynson's attorney until October 16, 1984.

(b) On page 3, paragraph 1 of the Petition, petitioner states that respondents conceded that "no authority existed investing petitioner and its officers with the duty or power to apprehend Gandy". To the contrary, respondents have never conceded that petitioner had no duty or power to apprehend Gandy immediately upon his failure to report. Respondents have conceded that they could find no duty to apprehend on the part of the public official, Prison Warden Kenneth Matty. *Hynson v. City of Chester,* 827 F.2d 932 (3 Cir. 1987) (Appendix, A6).

(c) Respondents cannot agree with the statements on page 2, paragraph 5 and page 3, paragraph 1 of the Petition, which indicate that when Gandy failed to report, "the prison officials on duty prepared an incident report that night, pursuant to the prison's 'no show' policy", and that "the sentencing judge was to be informed of Gandy's failure to report" and "requested to issue a bench warrant for Gandy's arrest". No discovery has yet taken place concerning the October 14, 1984 activities of the prison officials, which would serve to inform respondents thereof, and enable respondents to admit or dispute these facts.

(d) Petitioner is clearly mistaken in stating on page 3, paragraph 5 of the Petition that respondents "asserted for the

first time that the qualified immunity defense was not available to petitioner" during the course of oral argument before the Court of Appeals. Logically, respondents' Answer to Petitioner's Motion for Summary Judgment in the District Court argues against qualified immunity for petitioner, and respondents have maintained that position to this date.

SUMMARY OF ARGUMENT

A petition for writ of certiorari should not be granted in this case because the decision of the Court of Appeals of the Third Circuit does not conflict with any decisions of the United States Supreme Court, any federal district courts or courts of appeals, or any state courts of last resort. Rule 17.1(a), (b), and (c) of the Rules of the Supreme Court of the United States. The Third Circuit properly applied the law of *Owen v. City of Independence,* 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), to the facts of this case, with the result that petitioner must participate in a civil rights trial. Petitioner attempts to generate confusion and impose conflict where none exists, in the hope of convincing this Honorable Court to grant certiorari and interminably delay petitioner's participation in trial.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari should not be granted in this case because this Honorable Court has already addressed and ruled on the issue to be decided, and petitioner points to no conflicting decisions of any court.

Respondents instituted this lawsuit against several defendants, including a public official (Warden Kenneth Matty), and a municipal corporation (the Delaware County Prison Board of Inspectors), petitioner herein. Qualified immunity was sought for both the public official and the municipal corporation. For reasons

set forth in the minutest detail in the decisions of this Court, these two categories of defendants have been consistently treated separately and differently with reference to their entitlement to qualified immunity in civil rights cases.

The qualified immunity of public officials was addressed and recognized in several cases, taking into consideration the nature of the official's duties and his conduct in the circumstances of each particular case. *See, e.g., Dennis v. Sparks,* 449 U.S. 24, 101 S. Ct. 183, 96 L. Ed. 2d 185 (1980) (immunity of judges for actions performed in their judicial capacity); *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (immunity of presidential aides); *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (immunity of United States Attorney General concerning national security functions); *Anderson v. Creighton,* ____ U.S. ____, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (immunity of FBI agent for Fourth Amendment violation). Qualified immunity for a municipality, however, has been addressed, but has never been recognized.

In 1980, this Court decided *Owen, supra,* which involved a § 1983 claim against the City of Independence and several city officials. This Court held that there was no derivative, subjective, good faith, qualified immunity for the municipality based upon the good faith of the officials. This Court then went through an exhaustive analysis of the historical background and various policy considerations for the immunity doctrine in search of any other bases which would support municipal immunity. None was found. The *Owen* opinion could not be clearer in its denial of immunity to a municipality under § 1983 regardless of the circumstances. To date, *Owen* has not been overruled, qualified or clarified by this Court. Petitioner has pointed to no cases which evince confusion on the part of the courts, misapply *Owen,* or a conflict between *Owen* and any other judicial opinions.

Petitioner attempts to obfuscate the clarity of the *Owen* holding by interpreting *Owen* to deny only vicarious or derivative immunity to a municipality. Petitioner then argues that it seeks not derivative immunity, but immunity as "a person itself". What petitioner overlooks is that the *Owen* Court examined not just derivative immunity, but all avenues which may have led to the immunity of a municipality. The Court rejected them all. There is simply no immunity for a municipality under § 1983, only for human beings. While a municipality may have been held to be a "person" to facilitate the legislative intent that § 1983 apply to municipalities also, *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), it has never been held that a municipality is actually "a person itself" to be equated with human beings and to be favored with the identical policy considerations or other mitigating factors that human beings may deserve.

Petitioner argues that the Court of Appeals' holding unduly "extends" *Owen* and "extinguish[es] the distinct defense actually asserted by petitioner: a municipal person's own right to quick termination of insubstantial lawsuits by asserting objective immunity early in the litigation to dismiss the § 1983 claim because its policy did not violate clearly established constitutional rights". (Petition, p. 5, ¶ 3). Respondents submit that *Owen cannot* be extended — the case already holds that there is no immunity for a "municipal person" under any circumstances. Further, *Owen* does not extinguish any defense, or compromise any right, enjoyed by municipal corporations. The defense or right referred to by petitioner simply does not exist in the first place. The Court of Appeals plainly and clearly applied the law of *Owen* to the instant case. Petitioner's dissatisfaction with the outcome cannot be a basis for granting a writ of certiorari.

In further support of the argument that qualified immunity should be logically accorded to municipal corporations in the same

manner as it is to public officials, petitioner argues that the qualified immunity granted Warden Kenneth Matty by the Court of Appeals, and unchallenged by respondents herein, would be useless if Matty then must participate in the trial as a witness for petitioner. Petitioner argues that to grant immunity to the public official and not to the municipal corporation would frustrate the purposes of the doctrine of qualified immunity, in that the official's participation in the trial would interfere with the performance of his duties and the effective operation of government. Respondents are aware that considerations such as these and others are what led this Court to adopt an objective test for the qualified immunity of public officials, to be applied prior to trial for the purpose of preventing a public official from defending the trial of insubstantial claims against him. *Harlow, supra.* These same considerations were also examined by this Court in *Owen, supra,* 445 U.S. at 652-656, with reference to the immunity of a municipality, and were found to be much less compelling.

In *Dennis, supra,* this Court addressed the petitioner's argument. Dennis granted immunity to a judge for bribery and conspiracy, while denying immunity to his co-conspirators. Concern was expressed that the judge's immunity was worthless if he must still participate in the trial as a witness. The reasoning of this Court, set forth below, clearly applies to petitioner's concerns for Warden Matty in the instant case:

> Of course, testifying takes time and energy that otherwise might be devoted to judicial duties[.]
>
> * * *
>
> [T]he concern that his conduct will be examined in a collateral proceeding . . ., a proceeding in which he cannot be held liable for damages and

> which he need not defend, is not of the same order of magnitude as the prospect of being a Defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages.

Dennis, supra, 449 U.S. at 30-31, 101 S. Ct. at 188. The *Dennis Court* reasoned that the public harm potentially resulting from the judge having to testify, was outweighed by the need to provide a remedy to the party whose constitutional rights had been violated. Kenneth Matty is immune and need not defend this lawsuit. The fact that he may have to testify on one or two occasions does not constitute a compelling reason for this Court to also award immunity to the petitioner.

Petitioner further quotes the case of *Anderson, supra,* quoting out of context as follows: "*Harlow* clearly expressed the understanding that the general principal of qualified immunity it established would be applied 'across the board'." (Petition, p. 8, ¶ 1). This would appear to mean that the Court meant qualified immunity to be applied to municipalities as well as public officials. This is not the case. A reading of the *Anderson* case makes clear that by "across the board", this Court meant that qualified immunity applies to conduct of public officials resulting in constitutional violations of all types. (The plaintiffs in *Anderson* had asserted that qualified immunity does not apply when the conduct results in a violation of the Fourth Amendment right to be free from unreasonable search and seizure.) The *Anderson* case does not address in any manner whatsoever the application of qualified immunity to a municipality or municipal corporation.

Petitioner's further argument that this Court should grant certiorari because it has been determined that the petitioner's "no show" policy does not violate any clearly established constitutional rights, is also with merit. The Court of Appeals, in applying the

objective test for qualified immunity of *Harlow, supra,* with reference to Warden Matty, stated that while a duty to apprehend Gandy may have existed, "it can in no way be said to have been clearly established at the time of the alleged violation". This is irrelevant with respect to petitioner and the issue of the immunity of municipal corporations. Petitioner is not entitled to have the test for qualified immunity applied to it based upon *Owen, supra.* The issue of whether the petitioner's policy was unconstitutional, making petitioner liable to the plaintiff, must first be determined after trial in the District Court, not by the Court of Appeals in the course of applying a test for qualified immunity for a public official.

Ironically, the Court of Appeals in *Owen* seemed to apply the objective test of *Harlow*, which then did not exist, when it stated, "We hold the City not liable for actions it could not *reasonably* have known violated [the plaintiff's] constitutional rights". (emphasis supplied). The Supreme Court apparently chose not to apply an objective test or place any value on what a reasonable city would have done. The Court weighed the interests of the city and the victim and held no immunity applied, objective or otherwise.

Finally, petitioner has cited no case which in any way addresses the qualified immunity of a municipality or municipal corporation, and has made no argument not already examined by this Court in favor of overruling the clear and firm holding of *Owen, supra.*

CONCLUSION

For the above reasons, respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

Dated: November 30, 1987

Respectfully submitted.

A. TERRY DALY
A. TERRY DALY, LTD.
Attorney for Respondents

DEBORAH BRAND
Of Counsel